

1 Monday, March 9, 2020

2 THE COURT: For the record, the Court has before
3 it today Case Number 1:20CR04. The case is United States of
4 America versus Rafael Moore.

5 We're here today for final pretrial. Our trial is
6 scheduled for this Friday. We have jury selection scheduled
7 to begin on that date and time.

8 Counsel for the government, are you ready to proceed?

9 MR. KOLANSKY: Yes, Your Honor.

10 MR. WARNER: Yes, Your Honor. Carlos Warner,
11 assistant federal defender, here for Mr. Moore.

12 THE COURT: Counsel for the government, provide
13 the Court with a status, an update of the matter, please.

14 MR. KOLANSKY: Your Honor, since the last time we
15 were here, the government has filed a joint notice of
16 additional discovery that was turned over to defense counsel
17 along with a joint request for continuance.

18 Outlined within that motion filed by the government
19 was that shortly before the last time we are here, albeit,
20 quite frankly, I did not know that, shortly before we were
21 here, I received additional discovery material from my case
22 agent that then had to be turned over to offense counsel.

23 As I explained the last time, my case agent had been
24 injured in the line of duty and was out for approximately
25 two weeks of work which delayed the process of gathering the

1 discovery and getting it to me.

2 As soon as I received it, I have turned it over to
3 defend counsel along with, as we discussed at the last
4 hearing, some directions where I believe the pertinent and
5 relevant evidence is to hopefully streamline the discovery
6 review process for defense counsel.

7 However, since last we were here, the government has
8 turned over additional evidence in this case, Your Honor.

9 THE COURT: And what was the additional evidence?

10 MR. KOLANSKY: Your Honor, there were a couple of
11 different pieces that were turned over.

12 First, there were a couple of reports, including
13 reports of investigation done by that special agent -- or
14 that task force officer ^ ' cop chalk, totaling 56 pages of
15 discovery materials that included his opening of the case,
16 certified copies of the defendant's convictions, the
17 property that was -- that he took from Cleveland police's
18 custody and put into ATF's custody, and fingerprint
19 comparisons, things of that nature, Your Honor.

20 In addition, there were three cell phone downloads
21 that were turned over. Two of those downloads essentially
22 there was a report generated but there was no data extracted
23 from those cell phones, so each of those is two pages total.
24 Four pages for the two of them.

25 The third download, however, was 1,856 pages in PDF

1 format.

2 As I stated a moment ago, Your Honor, I did direct
3 defense counsel where I found what I believed to be
4 incriminating evidence based on my review of that cell phone
5 download in an effort, again, to streamline the process of
6 defend counsel's review.

7 THE COURT: When did you do this? When was did
8 you provide this material?

9 MR. KOLANSKY: That material was provided on
10 March 3 of this year, Your Honor. It was last Tuesday.

11 THE COURT: All right. Thank you.

12 Counsel for the defendant?

13 And just so it's clear for the record, I've previously
14 already overruled the motion for a continuance. I don't
15 want to debate it. I'm not going to revisit it. I have
16 issued an order, did it on Friday.

17 So when did you last provide -- when did you provide
18 the defendant with the proposed plea agreement?

19 MR. KOLANSKY: That, Your Honor, was prior to our
20 last -- the Court's indulgence one second. I have it in an
21 e-mail.

22 Your Honor, I believe it was on Tuesday, February 25.

23 THE COURT: Tuesday, February 25?

24 MR. KOLANSKY: Yes, Your Honor.

25 THE COURT: All right. Thank you.

1 Counsel for the defendant, regarding the status, the
2 update of the matter, please.

3 MR. WARNER: Good afternoon, Your Honor. May it
4 please the Court.

5 As the Court may be aware, we just filed, within, I
6 don't know, less than an hour ago, a motion to reconsider
7 the denial of the continuance and in the alternative to
8 exclude the evidence in total, given the fact that it was
9 turned over so late and I've had no opportunity to review
10 it.

11 Certainly Mr. Moore hasn't had an opportunity to get
12 the material yet. And even if I did have an opportunity, on
13 these kinds OF things we take a lot of time and we check the
14 government's forensics. We take a look at the phones.
15 There is many things that have to happen with this new
16 disclosure, let alone the fact that we still have the 12
17 hours of videotapes, everything else that was mentioned in
18 the last hearing.

19 So that's laid out in the motion.

20 THE COURT: You have not gone over all the
21 videotapes with your client since we last met?

22 MR. WARNER: Oh, no. Not yet, Your Honor.

23 THE COURT: So how many times have you been out
24 to see him and to go over the materials that we discussed at
25 the last hearing?

1 MR. WARNER: Well, we sat together here, and then
2 I spent a good two to three hours with him, what, last
3 Wednesday? And we spoke about things -- that was, I think,
4 immediately -- I hadn't seen yet but I had known that these
5 records were disclosed.

6 We talked about -- well, we had a good meeting on that
7 date.

8 So since the 27th, I've had one long meeting with him
9 along with another meeting here. And --

10 THE COURT: The nub of the issue is, just to get
11 the point, the nub of the issue is the cell phone records?
12 Is that what you're concerned about.

13 MR. WARNER: Well, no. It's really the entirety
14 of the case. I mean, there has been a plea agreement set
15 forth. I'm happy to speak with him, but we can't talk
16 cogently about a plea agreement or any other resolution
17 until we've analyzed all of the discovery.

18 We don't know -- frankly, there is a warrant on this
19 case. We don't know if there is a motion to suppress yet.
20 We haven't -- we're still trying to gather exactly what
21 happened.

22 THE COURT: You didn't look at the warrant in
23 this case? This case was arraigned back in January 17. You
24 mean you didn't look at the warrant to determine whether or
25 not there was an issue there?

1 MR. WARNER: Well, I received the warrant, Your
2 Honor, on February 24th.

3 THE COURT: All right.

4 MR. WARNER: So I did look at the warrant. But,
5 once again, whether or not there is a motion to suppress has
6 nothing to do with just the warrant. It has, Your Honor, to
7 do with the rest of the discovery, the search, whether or
8 not what kind of warrant is it? It could be a Franks
9 motion, in which case we will have to go out and do some
10 investigation, which we've done zero on this case, in order
11 to try to find out whether or not one of the officers may
12 not have been truthful in the warrant. It can go 16
13 different ways.

14 This is, frankly, Your Honor, not only a ten-year
15 mandatory minimum, but given the amount of documents, likely
16 a complex case.

17 THE COURT: Counsel, I'm sorry. With all due
18 respect, it's not a complex case at all. The last time you
19 were here -- now I'm hearing two different stories. The
20 last time you were here, it's, "Judge, I didn't have time to
21 go out and see my client and go over the discovery, to do
22 things I needed to do because I was involved in another case
23 before Judge Polster."

24 And that case involved a life, potential life
25 sentence, if I'm not recalling.

1 In the meantime, as I recall it, Mr. Moore had been
2 waiting because of your deep involvement in this other case
3 where, by the way, there were two other federal defender's
4 assigned to it.

5 Yes, I did look at the docket. And as a matter of
6 fact, yes, I looked at the docket again. And yes, I saw on
7 the 28th of this past month, February, that your office was
8 in fact removed from that case.

9 MR. WARNER: Correct.

10 THE COURT: So you now had days, and you tell me
11 now that you've been out to see this client one time. And
12 the video, I know we discussed at the last conference that
13 we had.

14 So I'm sorry. With all due respect, no. There has
15 been no good grounds shown for a continuance in the matter.

16 And if you want me to take up whether or not I should
17 exclude part of the government's evidence here, potentially
18 the cell phones -- the other information, counsel, with all
19 due respect, his prior record, all those are things that you
20 can find quite quickly and easily.

21 Pretrial does a report. So there much ado about
22 nothing.

23 So go ahead, finish your thoughts.

24 MR. WARNER: Your Honor, let me just put this on
25 the record.

1 First of all, we have the transcript from the 27th,
2 and that's not what I said. What I said, Your Honor, is
3 that I want to take some responsibility because I've been
4 engaged in another matter.

5 The Court hung onto that, but the reason why we asked
6 for the continuance on the 27th, according to the
7 transcript, is because of the timing of the discovery. Not
8 because of my involvement in any other matter.

9 I did apologize to Mr. Moore because during that
10 period we met two -- I think two or three times, and that is
11 not my norm. I try to see my clients almost every week,
12 every other week at worst.

13 That trial did resolve on the 28th. Last week was my
14 first free week open. And I spent three hours with this
15 client going over discovery. And not to mention all my
16 other things.

17 But he was my absolute first priority, and we sat and
18 talked until we had nothing else to talk about at that time.
19 I told him the strategy going forward.

20 So the idea that I'm asking for a continuance because
21 of the Smith matter is a red herring, Your Honor. It has
22 nothing -- we're asking for a continuance because the
23 discovery was turned over late, because of the agent's
24 injury in the line of duty.

25 I'm not blaming Mr. Kolansky. I believe that he's

1 been very professional. He has turned everything over in a
2 timely matter. I've been communicating with him. But
3 sometimes this happens in cases, and this is a case where I
4 may need, again, a forensic expert now with the telephone
5 records. We may end up resolving the case in some other
6 manner. We may do a motion to suppress. But I can't do any
7 of that analysis until I analyze all of the evidence. And
8 that will take some time.

9 We, frankly, were very judicious and asked for only 30
10 days in our motion because worst comes to worst, if I have
11 to triage this case number one, and I only work on this for
12 30 days and we go to trial, that is fine, Your Honor.

13 But if we go to trial on Friday, I will be
14 ineffective.

15 And I've called the Ohio Bar the Akron Bar, I've
16 called Washington D.C. And I've asked them what should we
17 do under these circumstances? And they are unanimous. They
18 are unanimous about how I should behave.

19 First of all, listen to the tribunal. If you make me
20 go to trial, you make Mr. Moore go to trial on Friday, we
21 will go to trial. And we will follow the orders as closely
22 as we can in the most timely fashion. I've worked on this
23 the entire weekend.

24 I will be ineffective. I will have to make a record
25 of that, and we will go from there.

1 THE COURT: You can make your record. I've
2 looked at this -- and counsel for the government, you can
3 file the discovery for the record in the case so that I can
4 review it, make sure I know exactly how much discovery there
5 is.

6 MR. KOLANSKY: Sure.

7 THE COURT: So that I can determine whether or
8 not counsel here has been diligent in going over the
9 discovery, preparing for trial in this case.

10 As I've already stated, these dates are not picked out
11 of the air. This date was picked by agreement of counsel by
12 the parties. I always ask. "Is this date agreeable."

13 We met. We discussed the matter. I granted a
14 continuance. I was told at that time 20 documents. Correct
15 me if I'm wrong. 12 hours of video. Not all the video is
16 going to be presented at trial. It's related to a search.
17 So we have a search.

18 So there has been adequate time, in my opinion.

19 So counsel can come here all the time and say, "Oh, I
20 don't have time. I don't have time. I'm not prepared. I'm
21 not prepared."

22 There has been more than adequate time. What you do
23 with counsel who is not either diligent or offers, again,
24 simply says "I'm not prepared" or "I'm not going to be
25 prepared."

1 We have until Friday, bear minimum Friday to prepare
2 ourselves for trial in this matter.

3 Whether or not I exclude the evidence the government
4 wishes to often. That's another option I can do.

5 If it's the cell phone records that are at issue, they
6 can certainly be excluded.

7 The others, the other documents, don't sound like
8 it's -- it's much ado about nothing.

9 Fingerprints, prior criminal record or certified
10 copies thereof, other information of that sort is not the
11 kind of things that counsel cannot look at and review with
12 his client.

13 So, anything else either side wishes to address with
14 the Court?

15 I'll look at the discovery before I make a final
16 decision. We can determine how extensive it is.

17 Make sure you give me exactly what you have so I can
18 go over it, determine whether or not counsel has been
19 diligent in going through this information with his client.

20 And I'll go back and look at the transcript. My
21 recollection is that much of this was about, "Oh, I'm so bus
22 which this other case that I haven't had the time."

23 Two to three times to see this client from what,
24 January 17 until we met February -- late February for final
25 pretrial?

1 MR. WARNER: Yes, Your Honor.

2 THE COURT: Okay. So whether or not that's
3 reasonable, I leave that to others to decide.

4 Anything else on behalf of the government?

5 MR. KOLANSKY: No, Your Honor. Thank you.

6 THE COURT: On behalf of the defendant?

7 MR. WARNER: Yes, Your Honor.

8 First of all, to be clear for the record, counsel has
9 had the discovery in his possession, will have it in his
10 possession for a total of -- it will be a three weeks total
11 that I will have had time to go through all of this between
12 the 24th -- not even three weeks. Excuse me. It's two
13 weeks and five days -- to go through all of the discovery,
14 to communicate with Mr. Moore, to form a defense, to hire
15 experts to do what we do on a trial where the man is facing
16 decades or longer in prison.

17 So, again, I'm asking the Court -- I've been before
18 this Court for 15 years now. I'm asking this Court for a
19 reasonable continuance so I can do my job and we can resolve
20 this case.

21 THE COURT: I've granted one continuance in this
22 matter already. I've listened to the parties about the
23 extent of the discovery.

24 So this is the first time I've now heard about
25 experts, suppression motions, things of that nature. Now

1 for the first time today, I've heard that argument in
2 support of another, another continuance in the matter.

3 We are extremely busy. I have a 17-defendant case.
4 I'm taking pleas next week.

5 I expect counsel to be diligent. I expect counsel to
6 be prepared. That's all we ask. I've given you one
7 continuance. I'm not giving you another.

8 If you want to make your record on Friday about your
9 inability to be prepared, then I'll look at the discovery in
10 this case to see exactly what it is. You can make your
11 record about how many times you've seen this client, how
12 much time you've spent with him, how much time you've
13 devoted to his defense in the matter.

14 That's your responsibility. Not mine. So, we're not
15 going to drag this case out for another 30 days. I'm sorry,
16 because you haven't done your job. That's the way I read it
17 or see it, or at least as you should have done it. Then
18 that doesn't mean we automatically continue matters for 30
19 days.

20 The government is delayed. I accept their
21 responsibility. If I need to exclude the cell phone record,
22 I'll do that. If I think that's warranted once I review the
23 discovery.

24 So that's how we're going to proceed in the matter.

25 The record will speak for itself as to what we

1 discussed at the last conference here and about what was
2 raised at that time and now what I'm hearing now today that
3 may very well be a new argument to try to push this case
4 out.

5 So anything else you want to say?

6 MR. WARNER: Yes, Your Honor.

7 THE COURT: Because I have another sentencing
8 here soon.

9 MR. WARNER: It's with me, Your Honor. Thank
10 you.

11 What I will tell you --

12 THE COURT: We have the marshals waiting.

13 MR. WARNER: A couple things, Your Honor, that I
14 need to make clear for the record.

15 Your continuance was for four days. That's the
16 continuance you granted us, a four-day continuance, after
17 knowing that we -- well, I guess you didn't know at the
18 time. But you were put on notice -- the Court was put on
19 notice that there are thousands of cell phone pages that
20 have to be reviewed.

21 Sure, the government may relay on parts that they
22 believe are incriminating. There could be any number of
23 text messages throughout those 2,000 pages that may be
24 exculpatory.

25 THE COURT: You've asked me to exclude them.

1 That's what your motion is. So if I exclude them, you don't
2 have to worry about them, right?

3 MR. WARNER: Well, that doesn't change the fact
4 that we still haven't been able to even do a rudimentary
5 investigation because it was turned over on the 24th.

6 And the Court has framed -- and the transcript is
7 attached to the motion that we filed -- has framed this
8 about me being involved in another case.

9 What simply happened, Your Honor, is Mr. Kolansky got
10 up, explained about the discovery, and because I was being
11 professional and he was being professional, I said "I don't
12 want to lay all the blame and Mr. Kolansky. I've been busy
13 too."

14 But the reason for the continuance has always been the
15 same. It's because of the discovery being turned over late,
16 which was at no fault of the prosecutors, because the
17 officer was injured in the line of duty.

18 So it was turned over on the 24th. You're asking me
19 to try a case where he could have a possible 15-year
20 mandatory minimum, possibly, at least ten, within -- and do
21 that two weeks and four days after getting the initial
22 discovery in my possession.

23 And during that time, the month or month and a half
24 between our an arraignment and when we came here, I saw Mr.
25 Moore several times. And I told him exactly what was

1 happening. We didn't have the discovery. He didn't have
2 it.

3 I don't know what the Court expects me to accomplish
4 in those meetings when I have no information from the
5 government except for the indictment.

6 So I have the transcript. We can go through it. But
7 this is clearcut. The discovery was late. The Court's
8 asking me to go to trial in two -- in less than three weeks.
9 Given all of this and the mandatory minimums, it's
10 impossible. It's ineffective.

11 The rules say that I -- the ethical rules say if the
12 tribunal orders it, I have to do it. And that's cited in
13 here.

14 But that's in conflict with other ethical rules that
15 say that I cannot proceed if I am either unprepared or will
16 be ineffective.

17 But I've conversed with him --

18 THE COURT: What do the rules say --

19 MR. WARNER: Excuse me?

20 THE COURT: Let me ask. What do the rules say
21 about counsel who doesn't diligently attempt to try and
22 adequately prepare for trial in a timely fashion? Because
23 today is the first day I hear about this new discovery. So
24 what do the rules say about adequately going forward,
25 preparing, taking the 20 documents that you had that we

1 discussed at the last time, taking the videos that we have
2 that was at issue the last time we met, and going over all
3 of those materials with your client between then, the 27th,
4 today the 9th, and going through all those documents and
5 saying, "Now, I will review with my client the proposed plea
6 agreement and we'll be prepared to address this matter on
7 the 9th as the judge previously indicated we would do"?

8 So why -- so what happens when the attorney just
9 simply says, "Well, can't get it done."

10 MR. WARNER: That's not what your attorney is
11 saying. Your attorney is saying that in between the two
12 conferences, I had a long meeting with Mr. Moore, as long as
13 I could. We didn't even have the phone records. I haven't
14 even been able to get them to him yet because they're so
15 voluminous. They have to be on a disk which is its own
16 process.

17 I have been more than diligent on this case. And it
18 is unfortunate that the Court would make this statement,
19 given what has occurred here.

20 I have done all that I can between the 24th and today,
21 including working all weekend, trying to catch up, knowing
22 that we might have a trial.

23 Because frankly, Your Honor, I view it as a free bite
24 at the apple because I'm going to be ineffective. Who knows
25 what the jury is going to do.

1 But that's going to be clear for the record.

2 So I'm just asking the Court to reconsider and think
3 about -- I'm not asking for a long continuance. I'm asking
4 for a short -- we asked for 30 days.

5 THE COURT: 30 days is not a short continuance,
6 counsel. It may be in your world. It's not in mine. It's
7 nowhere close to a reasonable continuance in the face of our
8 dockets here, in the face of what I've seen in this case.

9 So we're not going to go back and forth.

10 MR. WARNER: Okay.

11 THE COURT: You can lay on the record all you
12 want. The case ask what it is.

13 I will see the discovery. You can file it with the
14 Court promptly. We will look at it. And then we can make
15 our own independent evaluation of how diligent counsel has
16 been about the discovery in the case.

17 And then we'll decide whether there is going to be any
18 continuance, if at all.

19 If there is, it will certainly not be close to 30
20 days. Just so it's clear.

21 And so -- again, I don't want to hear about, "Oh,
22 Judge, we need a continuance, but I've got a conflict here,
23 a conflict there." We all have conflicts.

24 MR. WARNER: Your Honor.

25 THE COURT: That's why it's important to make

1 sure that we get these matters addressed timely.

2 MR. WARNER: May I?

3 THE COURT: And it may require a little hardship.
4 Is it may require taking a little additional time to get
5 those matters addressed.

6 MR. WARNER: Your Honor.

7 THE COURT: Quickly.

8 MR. WARNER: Quickly. Timeliness should not take
9 the place of effective representation, first of all.

10 Second of all, once again, we will -- if the Court
11 denies this motion, which it sounds like it is, then I just
12 have to tell you, we have prepared -- and we should schedule
13 another hearing -- a motion to withdraw.

14 And the motion to withdraw, again, this is from
15 instructions of, after speaking with ethical counsel.

16 That is ready to be filed. It will be filed today,
17 assuming that this motion is denied.

18 THE COURT: Counsel, you file what you would
19 like. You've just file something at 2:00 this afternoon
20 that I haven't had time to review, some motion for
21 reconsideration.

22 I denied your motion promptly on Friday. Told you
23 exactly what we were going to do in this case. So file what
24 you would like. I'll deal with it in due course.

25 In the meantime, I've already told you how we're going

1 to proceed of.

2 Anything else on behalf of the government?

3 MR. KOLANSKY: Thank you, Your Honor. No.

4 THE COURT: On behalf of the defendant?

5 MR. WARNER: No, Your Honor.

6 THE COURT: Thank you.

7 Get the discovery filed forthwith so that I can look
8 at it.

9 MR. WARNER: Oh. I'm sorry, Your Honor, there is
10 one thing, one thing I have to put on record regarding the
11 discovery. And I apologize.

12 If I may.

13 THE COURT: Quickly.

14 MR. WARNER: I'm going to object and lodge an
15 objection, and I'm going to ask to hold off before the
16 discovery is turned over to the Court.

17 I'm not sure that the Court should be privy to that
18 kind of information prior to the trial. I think that that
19 causes its own problem.

20 I think volume, that sort of thing is fine, but
21 reading or getting a copy of the discovery at this stage,
22 I'm not sure that that is appropriate for the Court. I
23 don't have want to say that 100 percent.

24 THE COURT: What's your authority for that,
25 counsel?

1 MR. WARNER: Well, my authority is a couple
2 things.

3 First of all, when we do any sort of pre-plea PSR
4 there has been to be a waiver for you to review that sort of
5 thing.

6 I don't think --

7 THE COURT: A waiver for me to review the
8 pre-plea PSR?

9 MR. WARNER: From the client.

10 THE COURT: When did that happen?

11 MR. WARNER: Well, that happens in every other
12 Court that I know of here. Before the client will engage in
13 a pre-plea PSR, he has to agree that the Court will review
14 said pre-plea PSR prior to sentencing.

15 THE COURT: Are you aware of anything like this,
16 counsel for the government?

17 MR. KOLANSKY: I can't say that I am, however,
18 however it's not an issue --

19 THE COURT: I have never heard it. Ever.

20 MR. WARNER: Well, I'm telling you every other
21 Court -- we can ask Mr. Corts if he is aware. I'm telling
22 you that I do pre-pleas in almost every other place and the
23 client has to waive.

24 Now, I'm not telling the Court right now 100 percent
25 that I am correct. It's just my strong intuition that that

1 would be inappropriate for the Court to review the discovery
2 prior to trial.

3 But if -- so I just ask for a pause. I can research
4 this issue. If there is no issue, I'll file a notice on it.
5 I'll say no objection.

6 But something strikes me as that being -- that's
7 incorrect. The Court should not be involved in the facts of
8 the case until they are presented to it in whatever format.

9 So we do a motion to suppress. I don't think the
10 Court should be prejudiced by reviewing all of the discovery
11 on the case.

12 THE COURT: Counsel, with all due respect -- I'm
13 sorry. If you have some authority, you can point me to it.

14 The Court reviews evidence in advance of trial on a
15 regular basis when we discuss issues like who is going to
16 testify, the witnesses there might be, etcetera, etcetera.

17 So I don't see it to be an issue. But if you want to
18 raise another issue, try to create some other issue to delay
19 the proceedings, you may. But do it promptly. Because I'm
20 instructing the government to get it filed so that I can
21 deal with this matter timely and promptly.

22 So you want to go back to your office and take a quick
23 look or inquire of others, do that as promptly as you can.

24 MR. WARNER: I ask for one day, if it pleases the
25 Court, to research that issue.

1 THE COURT: Thank you. Quickly. Thank you very
2 much.

3 MR. WARNER: Okay.

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5 (Adjourned, 3:00 p.m.)

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